Contents

Acknowledgments .......................................................... vii

Introduction ............................................................. ix

About the Authors ......................................................... xi

Chapter 1
CERCLA AND THE BONA FIDE PROSPECTIVE PURCHASER  .......... 1
  I. Introduction .......................................................... 1
  II. Qualifying as a Bona Fide Prospective Purchaser .................. 3
      A. Disposal of hazardous substances occurred prior to purchase. ........ 5
      B. Party performs all appropriate inquiries. ................................ 5
      C. Party provides all legally required notices. ............................ 8
      D. Party exercises appropriate care by taking reasonable steps. .......... 8
      E. Party provides full cooperation, assistance, and access. .......... 9
      F. Party complies with land-use restrictions and does not impede the
          effectiveness or integrity of institutional controls. .................... 10
      G. Party complies with requests for information or administrative
          subpoenas. .......................................................... 11
      H. Party is not affiliated with persons that are potentially liable for
          response costs at the facility. ....................................... 11

Chapter 2
Element One—Disposal Prior to Acquisition, 42 U.S.C. § 9601(40)(A) .......... 13

Chapter 3
Element Two—All Appropriate Inquiries, 42 U.S.C. § 9601(40)(B) .......... 19
  I. All Appropriate Inquiries—Background .............................. 23
  II. The AAI Final Rule—The Regulatory Text ........................... 25
      A. Results of Environmental Professional’s Inquiry
         (40 C.F.R. § 312.21) .................................................. 26
      B. Interviews with Past and Present Owners, Operators, and Occupants
         (40 C.F.R. § 312.23) .................................................. 28
      C. Reviews of Historical Sources of Information (40 C.F.R. § 312.24) .. 29
      D. Searches for Recorded Environmental Cleanup Liens (40 C.F.R.
         § 312.25) .......................................................... 31
      E. Federal, State, Tribal, and Local Government Record Review
         (40 C.F.R. § 312.26) .................................................. 31
      F. Visual Inspections of the Facility and of Adjoining Properties
         (40 C.F.R. § 312.27) .................................................. 33
iv

G. Prospective Landowner’s Specialized Knowledge or Experience
(40 C.F.R. § 312.28) ........................................................................ 34
H. Relationship of Purchase Price to Uncontaminated Property Value
(40 C.F.R. § 312.29) ........................................................................ 35
I. Commonly Known or Reasonably Ascertainable Information
(40 C.F.R. § 312.30) ........................................................................ 35
J. Degree of Obviousness and Ability to Detect Property Contamination
(40 C.F.R. § 312.31) ........................................................................ 36
III. All Appropriate Inquiries: A Judicial Interpretation ......................... 37
   A. An Initial BFPP Eligibility Element: The Level of Inquiry Required
to Satisfy AAI Standards ............................................................. 39
   B. Timeliness of Prospective Purchaser Inquiry .............................. 41
   C. Prospective Purchaser Status .................................................. 41
   D. Innocent Landowner Defense: All Appropriate Inquiries Requirement 43
IV. Conclusion ............................................................................... 49

Chapter 4
Element Three—Legally Required Notices, 42 U.S.C. § 9601(40)(C) ........ 51

Chapter 5
Element Four—Appropriate Care Through Reasonable Steps, 42 U.S.C.
§ 9601(40)(D) ............................................................................. 55
   I. EPA Guidance ......................................................................... 56
   II. ASTM Guidance ...................................................................... 57
      A. Step 1—Determining Whether Continuing Obligations Apply ...... 58
      B. Step 2—Reviewing and Evaluating Environmental Conditions at the
         Property ................................................................................ 58
      C. Step 3—Identifying and Performing Initial Continuing Obligations . 59
      D. Step 4—Identifying and Performing Ongoing Continuing Obligations 62
   III. Case Law ............................................................................... 62
      A. Timeliness of Landowner Response ....................................... 63
      B. Restriction of Public Access and Notice .................................. 66
      C. Exacerbation of Existing Environmental Conditions ............... 67
      D. Notification and Communication with Agencies .................... 68

Chapter 6
Element Five—Cooperation, Assistance, and Access, 42 U.S.C.,
§ 9601(40)(E) ............................................................................. 71
   I. Relevant EPA Guidance ........................................................... 72
   II. Case Law ............................................................................... 76
   III. Cooperation and Assistance .................................................... 80
Appendix F: Policy Towards Owners of Residential Property at Superfund Site .......................................................... 163
Appendix G: Brownfields Amendments Conference Report ......................... 173
Appendix H: CERCLA Hazardous Substances .................................................. 225
Appendix I: Entry and Continued Access Under CERCLA ........................... 227
Appendix J: Transmittal of Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas .......... 243
Appendix K: Recommendations Concerning the Use and Issuance of Administrative Subpoenas Under CERCLA Section 122 ................. 293
Appendix L: Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners ..................................................... 297
Appendix M: Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision .................................................................................. 309
Appendix N: Bonafide Prospective Purchasers and the New Amendments to CERCLA ........................................................................... 315
Appendix O: Support of Regional Efforts to Negotiate Prospective Purchaser Agreements (PPAs) at Superfund Sites and Clarification of PPA Guidance ................................................................. 321
Appendix P: Issuance of CERCLA Model Agreement and Order on Consent for Removal Action by a Bona Fide Prospective Purchaser ........ 329
Appendix Q: Issuance of CERCLA Model Agreement and Order on Consent for Removal Action by a Bona Fide Prospective Purchaser .... 361

Index .................................................................................................................................................. 381